

by the provisions of the Bankruptcy Act,⁴⁷ states can, and do, defeat the claim of the trustee so as to benefit favored creditors.⁴⁸ This means that in the bankruptcy situation state law will essentially determine the validity, or at least the value, of an unfilled federal tax lien—a result very much at odds with the result outside of bankruptcy.⁴⁹ To make federal tax claims subject to state law seems to injure the principle of uniformity the Court laid down in *Gilbert* and apparently desires to preserve.

Gilbert has been widely cited as authority for the proposition that Congress used the words "mortgagee, pledgee, purchaser, or judgment creditor" in section 6323 in the "usual, conventional sense."⁵⁰ It now appears that this statement has been substantially disavowed. If so, *quaere*: What effect will this disavowal have on the precedential value of decisions citing *Gilbert*? So long as the principle of uniformity is preserved, will courts be freer to consider general policy in determining priorities against the federal tax lien? The only such policies the Court suggests are the policy against secret liens and the policy in favor of protecting state and local tax-gathering against federal encroachment. This seems to extend the erosive pattern which has since 1805 characterized judicial treatment of statutes granting priority to debts due the United States.⁵¹ If such erosion is truly desirable, it ought not to depend on the fortuitous⁵² intervention of bankruptcy. If not, bankruptcy ought not to produce undeserved windfalls for state and local taxing authorities.

TERENCE M. TROYER

Contracts—Health and Dance Services—Rescission for Customer's Disability.—*Acosta v. Cole*.¹—Plaintiff contracted with a local Arthur Murray Dance Studio in Louisiana for 1205 hours of lessons for the prepaid sum of \$11,000. Plaintiff then became physically unable to use all of the lessons and sued to recover the unearned portion of the consideration. The lower court held that a "no-refund" clause in the contract precluded recovery. The Louisiana Court of Appeal, reversing,² HELD: A party to a prepaid contract

⁴⁷ 4 Collier, op. cit. supra note 17, ¶ 70.70, at 1520.

⁴⁸ S. Rep. No. 1133, 88th Cong., 2d Sess. 2 (1964). For an example of this process, see U.C.C. § 2-702. California, Illinois, Maine, New Mexico, and New York have omitted the words "or lien creditor" to avoid the result of *In re Kravitz*, 278 F.2d 820 (3d Cir. 1960). Willier & Hart, Uniform Commercial Code Reporter-Digest 1-171 (1965).

⁴⁹ See *United States v. White Bear Brewing Co.*, supra note 9; *United States v. Acri*, 348 U.S. 211, 213 (1955).

⁵⁰ E.g., *Hoare v. United States*, 294 F.2d 823, 825 (9th Cir. 1961) (mortgagee).

⁵¹ See Comment, 7 B.C. Ind. & Com. L. Rev. 366, 367-69 (1966). See generally Kennedy, supra note 9.

⁵² Over 98% of bankruptcies are initiated by voluntary petitions. Countryman, *Bankruptcy Boom*, 77 Harv. L. Rev. 1452, 1453 (1964).

¹ 178 So. 2d 456 (La. App. 1965).

² The lower court had awarded plaintiff the sum of \$98.08 but had rejected plaintiff's other demands. The court of appeal did not actually reverse the lower court but amended the decision allowing plaintiff to recover the unearned portion of the contract price.

for dance lessons is entitled to a refund for the unused lessons when physical disability makes their use impossible; the no-refund clause is of no effect since the contract is entirely rescinded. The court concluded that, under the Louisiana Civil Code, a contract designed for the personal gratification of the contractor is a "personal" contract³ and then applied the code provision which dissolves a "personal" contract when the party is unable to perform.⁴

Insofar as the court's decision was based on the Louisiana Civil Code, it is of no import to other jurisdictions and may be accepted as correct, although the wisdom of this statutory arrangement may be questioned,⁵ and the court's code analysis is, at best, suspect.⁶ The Louisiana court committed significant error, however, when it attempted to explain in terms taken from the common law of contracts the result it had reached under its civil code. It relied heavily on an earlier Louisiana case, *Richardson v. Cole*,⁷ which held that contracts for dancing lessons were reciprocally personal and explained that this term meant that each party had bound himself to perform personal acts for the benefit of the other: plaintiff was obligated not merely to pay for the lessons, but also to *receive* them.⁸ This finding led the court to classify the contract as a "personal service contract" which is terminated when the party personally bound becomes unable to perform. This finding poses a threat to the integrity of contract law.

"Personal," as used in the Louisiana Code⁹ and in *Richardson*,¹⁰ is a purely arbitrary term chosen to designate a type of contract which the legislature deems should be terminated upon the incapacity of the party to perform¹¹ and has no relation to the common law term "personal service

³ La. Civ. Code Ann. art. 2001 (1945):

The obligation shall be presumed to be personal as to the obligee, in a contract to do or give, when that which was to be done or given, was exclusively for the personal gratification of the obligee, and could produce no benefit to his heirs.

⁴ La. Civ. Code Ann. art. 2003 (1945):

... [I]f the obligation be purely personal as to the obligee who dies before performance, his heirs may recover from the obligor the value of any equivalent he may have received.

The court followed an earlier case, *Richardson v. Cole*, 173 So. 2d 336 (La. App. 1965), which interpreted the phrase "dies before performance" as being analogous to "becoming disabled before performance" and thus found this statute applicable to cases involving the total and permanent disability of either party.

⁵ Most contracts are for the personal gratification of at least one of the parties. The statute might provide an easy escape for a party who becomes unwilling to perform.

⁶ It is doubtful that the contract was "exclusively" for the personal gratification of the plaintiff within article 2001. Plaintiff had prepaid the lessons and no reason is apparent why, upon her death, her heirs could not enjoy the benefit of the contract. Also, it must be remembered that Louisiana is a code state and the court's analogizing of the words "dies before performance" to "becoming disabled before performance" is contrary to the clear wording of the statute. A fair reading of articles 2000-07 indicates that the concept of personal contracts embodied therein does not include the instant case.

⁷ *Supra* note 4.

⁸ *Supra* note 1, at 463-64.

⁹ La. Civ. Code Ann. art. 2001 (1945).

¹⁰ *Richardson v. Cole*, *supra* note 4.

¹¹ La. Civ. Code Ann. art. 2003 (1945). Although the statute specifically refers to "death," the court applied it by analogy to a party who becomes physically disabled before performance.

contract."¹² The latter describes a contract which depends on the taste,¹² skill¹³ or science¹⁴ of the promisor; personal performance by the promisor is of the essence.¹⁵ The defendant in *Acosta* may have engaged to perform personal services,¹⁶ but it cannot be said that plaintiff did. Her only obligation was to pay, and this obligation she has fully performed. Defendant could hardly have objected if plaintiff had sent a substitute to receive the lessons.¹⁷ Since plaintiff's personality was not material to the contract, it could not have been personal as to plaintiff in the common law sense of the term.¹⁸ Thus, while equitable considerations of fairness and convenience seem to require the result reached in *Acosta*, and while the approach taken by the Louisiana court may be sound for Louisiana, other states which have no civil codes would do a disservice to contract law if they were to adopt the Louisiana approach.

As leisure time has grown in importance in modern society, businesses dispensing personal services—dancing lessons, weight reduction, physical culture—have appeared with increasing frequency. These businesses are always careful to stay within the strict letter of the law, but their methods are often predatory. Some make special efforts to solicit gullible persons or widows and old maids seeking the companionship of male instructors.¹⁹ The contracts made with these people are often for large sums of money²⁰ and contain no-refund clauses,²¹ disclaimers from liability for the studio's negligence,²² and other terms²³ which are not illegal but which often work to the detriment of the customers. When businessmen act in such a manner toward customers who are ill-equipped to protect themselves, courts (or legislatures) should, as in *Acosta*, find some way to reach a fair result if this can be done

¹² *Kelly v. Thompson Land Co.*, 112 W. Va. 454, 164 S.E. 667 (1932).

¹³ *Wasserman Theatrical Enterprise, Inc. v. Harris*, 137 Conn. 371, 77 A.2d 329 (1950) (actor); *Stearns v. Blevins*, 262 Mass. 577, 160 N.E. 417 (1928) (architect); *Rowe v. Compensation Research Bureau, Inc.*, 265 Wis. 589, 62 N.W.2d 581 (1954) (underwriter's ability and skill in selling insurance contracts).

¹⁴ *Cutler v. United Shoe Mach. Corp.*, 274 Mass. 341, 174 N.E. 507 (1931) (inventor).

¹⁵ *Cates v. Cates*, 268 Ala. 11, 104 So. 2d 756 (1958).

¹⁶ It should be noted, however, that, while the defendant may have been required to perform services requiring skill and ability, it does not appear that the personality of any instructor was material.

¹⁷ While the contract contained a clause which denied refunds for any reason, it did not expressly prohibit assignment, nor would such substitution materially alter the defendant's obligation. See *Restatement, Contracts* § 151 (1933).

¹⁸ *Lucas v. J. H. Gross Motor Car Co.*, 32 Ohio App. 183, 161 N.E. 362 (1927).

¹⁹ See, e.g., *Syester v. Banta*, 133 N.W.2d 666 (Iowa 1965).

²⁰ *Howard v. White*, 356 P.2d 484 (Colo. 1960) (\$20,000); *Syester v. Banta*, supra note 19 (\$29,000); *Acosta v. Cole*, supra note 1 (\$11,000); *Richardson v. Cole*, supra note 4 (\$10,000).

²¹ Supra note 1; *Richardson v. Cole*, supra note 4.

²² See *Owen v. Vic Tanny's Enterprises*, 48 Ill. App. 2d 344, 199 N.E.2d 280 (1964); *Ciofalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 177 N.E.2d 925, 13 App. Div. 702 (1961). These cases involved an exculpatory clause in a health service contract. However, the obligations incurred there are substantially similar to those in contracts for dance lessons.

²³ See, e.g., *Slenderella Systems, Inc. v. Greber*, 163 A.2d 462 (D.C. Munic. Ct. App. 1960).

without undue injury to the defendant. Where the subject matter of the contract is services, it probably cannot be argued that the business has incurred any special expense on plaintiff's behalf.²⁴ Furthermore, defendant can better stand the loss since he can probably find another customer to fill the time for which plaintiff had contracted. A defendant in a similar California case²⁵ argued that the award to plaintiff would endanger his business, since the performance of prior contracts was dependent on the proceeds from the contract with plaintiff. The California court quickly dismissed the argument, however, by condemning the defendant's shoestring practices.²⁶

In lieu of the personal service contract approach, some courts have applied the doctrine of "impossibility of performance"²⁷ to terminate contracts of this type when a party is no longer able to accept performance. The Municipal Court of Appeal for the District of Columbia applied this doctrine in *Slenderella Systems, Inc. v. Greber*²⁸ to relieve a customer of liability under a long-term contract for weight reducing treatments when a chronic back ailment was aggravated by the treatments. It is submitted that the doctrine does not apply—the sum total of the customer's performance was payment, and this was not made impossible by her ailment. The plaintiff studio could not perform the services if she did not appear to receive them; the plaintiff could not be legally required to do more than stand ready to deliver them when demanded.²⁹ It is not this type of "impossibility" to which the doctrine refers.³⁰

The problem posed by the abuses of dance studios cannot, then, be solved by resort to doctrines which draw well-defined exceptions to the traditional immutability of contracts. The personal service and impossibility of performance rules are designed to make possible a fair result when strict contract law would yield the opposite,³¹ but these rules are too narrow in scope to encompass situations in which one of the parties is unable to receive performance. Perhaps one or both of these doctrines ought to be broadened to do so, but this would introduce an element of uncertainty into contract law, the undesirability of which is obvious. Other, broader

²⁴ It is highly unlikely that a special instructor was reserved for plaintiff's lessons or that a particular course of instruction was adapted to meet plaintiff's needs.

²⁵ *People v. Arthur Murray, Inc.*, 47 Cal. Rep. 700 (Ct. App. 1965).

²⁶ The growing demand for personal services has precipitated shoestring expansion: businessmen are establishing more branches, franchises, licensees, and agencies than they can presently afford to pay for, depending upon the expected flood of business for financing. These initial expenses are met by obtaining prepaid, long-term contracts for their services. The cost of the services due under these contracts must then be met by obtaining other, similar contracts. This process can become endless if demand does not meet expectations—a customer who pays for services may not receive them, since the bubble bursts if no later "victim" can be found. *Id.* at 707.

²⁷ See Simpson, *Contracts* § 135 (1954).

²⁸ *Supra* note 23.

²⁹ *Echols v. Miller*, 218 S.W. 48 (Tex. Civ. App. 1920).

³⁰ Impossibility of performance excuses the promisor's duty when that which was promised becomes objectively impossible. As the contract was not personal to the defendant, her subjective inability to receive the other's performance because of her illness would not excuse her obligation to pay. See Simpson, *op. cit.* *supra* note 27.

³¹ See Williston, *Contracts* § 1931 (1938).

exceptions might be created, although courts are reluctant to do so³² since the dangers they pose to the constancy of contract law are difficult to justify. For example, a court could refuse to enforce harsh provisions against particularly helpless or gullible customers where an entrepreneur has deliberately sought out such customers.³³

The first time a court is confronted with a case involving personal service studio abuses which do not violate any particular statute, either of the above approaches might yield a fair result, while an insistence on strict contract interpretation would be sound in theory but might result in injustice. In any case, the problem should not have to arise more than once. The obvious solution is legislation which clearly covers dance and health studio services, without any attempt to justify the legislation in contract theory.³⁴ Only in this manner will it be possible, without robbing contract law of its certainty, to cure the abuses in personal service businesses.

JOHN R. BAGILEO

³² *Owen v. Vic Tanny's Enterprises*, supra note 22; *Ciofalo v. Vic Tanney Gyms, Inc.*, supra note 22.

³³ U.C.C. § 2-302 indicates a growing trend toward condemnation of unconscionable contracts.

³⁴ California has passed a statute which avoids contracts of dance and health studios which contain certain provisions deemed to be unfair. Cal. Civ. Code §§ 1812.80-.95. The reason given for this legislation is that there have been repeated abuses in these businesses. §§ 1812.80(a), (b). Failure of any contract for dancing lessons to comply with the specific provisions of the act will cause the contract to be declared void and unenforceable as contrary to public policy. § 1812.91. All such contracts must be in writing, § 1812.82, and the maximum amount that can be charged a buyer for such services is \$500. § 1812.86. Payments or financing by the buyer must not extend over more than two years from the date the parties enter into the contract, § 1812.84, and contracts between the same parties are considered as one contract if there are any overlapping periods. § 1812.83. In order to prevent the circumvention of this requirement, the seller's services must begin within six months after the date the contract is executed. § 1812.85. Thus, the parties cannot execute a series of contracts to cover successive periods. No contract can run for a term exceeding seven years from the date the contract is made, and lifetime contracts are forbidden. § 1812.84. By the provisions of the act, California minimizes the chance that unwise and improvident contracts will be executed. Also, any party who is injured by a violation of the act has the extraordinary remedy of treble damages and may recover reasonable attorney's fees. § 1812.94.

The problem which confronted the courts in *Acosta* and *Richardson* is specifically dealt with in the act. Every contract for health and dance studio services must contain a clause providing that if the buyer should die or become disabled, and he has prepaid the services, he or his estate is to receive back the proportionate amount for the services not received. § 1812.89(b). Also, where the buyer has not prepaid the sum for services, his death or disability will relieve him or his estate from the obligation of paying for services not received. § 1812.89(a). Thus the courts will not have to imply conditions into the contract in order to grant relief to a disabled buyer. Rather, they may do so under the positive provisions of the agreement. The parties may not defeat any of the provisions of the act by waiver because to do so will render the contract void and unenforceable. § 1812.93.

The constitutionality of the California Dance Act was upheld in *People v. Arthur Murray, Inc.*, supra note 25. Little reason can be seen for the failure of other jurisdictions to follow the California lead.